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No. 217

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In The

# Supreme Court of the United States

October Term, 1932.

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Guaranty Trust Company, Executor, Etc.,
*Appellant,*

vs.

William H. Blodgett, Tax Commissioner,
*Appellee.*

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Appeal from the Superior Court of Fairfield County, Connecticut.

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## APPELLANT'S ANSWER TO APPELLEE'S MOTION TO AFFIRM.

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Appellee filed a motion to affirm the judgment of the court below, without giving appellant an opportunity to be heard, on the ground that the questions on which the decision of the cause depends are "so unsubstantial as not to need further argument." In support of this motion appellee argues (1) that no question can arise as to the meaning and construction of the taxing statute, and (2) that it has already been decided by this Court that a state has power to tax such a transfer as this prospectively.

In the Jurisdictional Statement filed under Rule 12(1), appellant has taken special care to show that the federal questions involved in the case were substantial (pp. 7-13 of the Jurisdictional Statement).

## I.

### SUBSTANTIAL FEDERAL QUESTIONS RAISED IN THIS CASE.

1. Appellant contends that although the Supreme Court of Errors of Connecticut has expressly held that there was no retroactive application of any statute, and that the transfer was taxable under the 1923 Statute which was in force at the time of the transfer, it actually gave effect to the 1929 Statute, enacted after the transfer. Appellant will show, furthermore, that while the tax might be sustainable under the later statute, it can not be sustained under the earlier statute. Upon a showing of this fact a substantial federal question immediately appears under the contract clause of the Constitution.

2. Appellant also maintains that the retroactive application of the 1929 Statute results in a denial of due process, under the authority of *Coolidge v. Long*, 282 U. S. 582.

3. Assuming that the court below gave no retroactive effect to the 1929 Statute, but actually applied the 1923 Statute, appellant maintains that the tax in question was contrary to the due process clause, because the state undertook to impose a death duty upon a transfer which was not in effect a testamentary disposition. That presents a substantial federal question, whether, under the decisions of this Court in *Coolidge v. Long*, 282 U. S. 582, and *Heiner v. Donnan*, 285 U. S. 312, an irrevocable trust, *not made in contemplation of death*, can be taxed as a testamentary disposition.

4. In view of the strained construction by the court below, that the tax was imposed not upon the succession to the property upon the death of the decedent, but upon *the succession to the possession or enjoyment of the property,* appellant will show in its main brief that the operation and effect of such construction is to render the tax in question not a succession tax, but a gift tax, and as such is contrary to the equal protection clause of the 14th Amendment.

These are the main federal questions in the case. They cannot be regarded as unsubstantial.

## II.

### MEANING OR CONSTRUCTION VS. OPERATION AND EFFECT.

Appellee maintains that no question can arise as to the meaning and construction of the taxing statute. Appellant agrees entirely with this proposition of law. Appellant is not questioning the correctness of the interpretation of the statute. It says, however, that accepting that construction, the *operation and effect* of the statute is such as to deprive appellant of its constitutional rights (See p. 8 of the Jurisdictional Statement).

It is interesting to note that appellee in the first sentence under that argument (p. 3 of the Motion) confuses "meaning or construction" with "effect and operation."

Appellee says:

> "The court below held that the legislature intended by the words used in the statute, to tax such a transfer as the one in the case at bar."

Appellant maintains that whatever may have been the intent of the legislature in its use of the words of the

statute, the application of the statute operates contrary to the due process and equal protection clauses of the 14th Amendment.

## III.

### THE VALIDITY OF THE TAX HAS NOT BEEN DETERMINED BY THIS COURT, CERTAINLY NOT IN FAVOR OF THE APPELLEE.

Appellee further states that the power to impose such tax has been recognized by this Court, and cites the cases of

*Coolidge* v. *Long*, 282 U. S. 582
*Nickel* v. *Cole*, 256 U. S. 222
*Keeney* v. *New York*, 222 U. S. 525.

None of these cases supports appellee's contention.

1. *Coolidge* v. *Long* did not involve "the same statutory phrase as here in question" (p. 4 of the Motion). There the statute provided for a tax on

> "All property within the jurisdiction of the commonwealth * * * which shall pass by * * * deed, grant or gift, * * * made or intended to take effect in possession or enjoyment after his [grantor's] death * * * to any person, absolutely or in trust, * * *." (282 U. S. 582, 595).

The wording of that statute is equivalent to the Connecticut Statute of 1929 (p. 10 of the Jurisdictional Statement), but not to the Connecticut Statute of 1923, which imposed a tax measured by "all property and any interest therein owned by a resident of this state at the time of his decease, * * *."

Furthermore, the sentence quoted from Mr. Justice BUTLER's opinion must be read in conjunction with the preceding sentence. The phrase that "the state has

power to lay *such* an excise upon properties *so* passing" refers to the phrase in the preceding sentence, "upon property of the deceased transferred at his death." If the sentence quoted is read in connection with the preceding sentence, it becomes evident that it does not cover the present case, for here the property in question was not transferred at the decedent's death.

Finally, even if the sentence quoted did cover the present situation, still the case of *Coolidge* v. *Long* held the tax unconstitutional. The statement that the state had power to impose *such* tax *after* the taking effect of the taxing act was not necessary for the decision and must therefore be considered mere *dictum*. It is interesting to note that appellee in his brief in the Supreme Court of Errors, after discussing the facts of *Coolidge* v. *Long*, said:

> "No more comment is required, except to point out two sentences from the majority opinion, which, if not *obiter*, we respectfully submit are decisive of the questions now before this Court."

And then appellee quoted the two sentences.

2. In *Nickel* v. *Cole*, 256 U. S. 222, there was clearly a disposition testamentary in character. There, one Miller made a will and at the same time a deed of trust conveying certain property in trust to himself for life and after his death upon limitations similar to those in his will—any payment under the will to be in satisfaction of the provisions both in the will and in the deed. It is true the deed contained no power of revocation, but its effect could be nullified at any time by a provision in the will for payments equal to the properties conveyed in trust. The State Court held that the execution of the deed and will was one transaction and gave no vested right until there was death (p. 225). The transfer was

testamentary because it was in effect made by the will and also because the deed was revocable by the will, and was therefore a transfer which took effect at the death of the grantor.

3. In *Keeney* v. *New York*, 222 U. S. 525, the decedent had executed a deed conveying certain stocks and bonds to a trust company in trust to hold the same during the life of the trustor and to divide the net income equally between herself and her three children, with the further provision that after her death the trustees should pay the entire income, or transfer the property, to her children. In the deed she *reserved the right to revoke or alter the whole or any part of the trust conveyance, at any time after six months notice in writing.* We think nothing further need be said about this case, except that the appellee knew the trust was revocable. In his brief in the Supreme Court of Errors the appellee said:

> "• • • an examination of the record shows that the trust there was revocable although neither the New York Court of Appeals nor the United States Supreme Court so much as mention that fact in their opinions."

That fact was brought out in this Court's statement of facts (p. 526).

Assuming that the cases relied on by the appellee do support his view, there would arise so many inconsistencies between those cases and later decisions (compare for example *Nickel* v. *Cole* with *Untermeyer* v. *Anderson*, 276 U. S. 440, as to the effective date of the statute, and *Keeney* v. *New York* with *Coolidge* v. *Long*, as to the effect of the irrevocable trust) that the questions involved in this case could not be considered unsubstantial. The mere fact that a question of law had already been

passed on by this Court does not render it unsubstantial in determining the right to appeal.

*Farmers Loan & Trust Co.* v. *Minn.*, 280 U. S. 204
*Baldwin* v. *Mo.*, 281 U. S. 586
*Fox Film Corp.* v. *Doyal*, 286 U. S. 123.

Appellant submits that appellee's motion to affirm the judgment below without hearing the appellant should be denied, or that consideration of the motion be postponed until the hearing of the case on the merits.

Respectfully submitted,

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